

Update: Michigan Circuit Court Benchbook

CHAPTER 1

General Rules Governing Court Proceedings

1.1 Access to Court Proceedings and Records

F. Limits on Access to Court Records—MCR 8.119(F)

Insert the following text at the top of page 5:

Transcripts generated from court proceedings and filed with the court clerk “are a part of the record for purposes of a sealing order” issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the June 2005 update to page 112:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.24 Summary Disposition

B. Timing

Insert the following text immediately before sub-subsection (1) on page 175:

In an unpublished decision, the Court of Appeals has held that a court may set deadlines for motions for summary disposition pursuant to MCR 2.401(B)(2)(a)(ii), as that more specific rule controls over the general rule that motions under MCR 2.116 may be filed at any time. *Kemerko Clawson LLC v RXIV Inc*, unpublished opinion per curiam of the Court of Appeals, decided October 20, 2005 (Docket No. 255887). The court questioned the conclusion in *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 254 Mich 241, 248 (2002), rev'd 472 Mich 44 (2005), cited below.

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.48 Jury Deliberation

A. Materials in Jury Room

On page 231, before the final paragraph in this subsection, add the following text:

If, after the jury returns its verdict, the court discovers that material was provided to the jury that was not admitted into evidence, before addressing a possible remedy, the court should conduct a hearing to determine whether the jury reviewed the non-admitted materials. *Mays v Schell*, ___ Mich App ___, ___ (2005). A jury's consideration of documents that were not admitted into evidence "does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case." *Id.* at ___, quoting *Phillips v Diehm*, 213 Mich App 389, 402–03 (1995). This includes a determination whether the documents were actually considered by the jury in reaching a verdict. *Mays, supra* at ___, quoting *People v McCrea*, 303 Mich 213, 266 (1942). In *Mays*, during deliberations in a medical malpractice case, the jury requested the plaintiff's complete medical records. Inadvertently, the jury was provided with defense counsel's banker's box, which contained numerous items about the case that were not admitted at trial: other medical records, deposition transcripts, deposition summaries, memos to the file, correspondence with the client and the client's insurance company, and defense counsel's notes. The Court of Appeals overturned the trial court's decision granting a new trial "because the record does not reflect that the jury in fact looked at, let alone relied on, the materials not admitted into evidence"

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the July 2005 update to page 415:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence

violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ____.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.49 Jury Deliberation

A. Materials in Jury Room

Add the following text immediately before subsection (B):

If, after the jury returns its verdict, the court discovers that material was provided to the jury that was not admitted into evidence, before addressing a possible remedy, the court should conduct a hearing to determine whether the jury reviewed the non-admitted materials. *Mays v Schell*, ___ Mich App ___, ___ (2005). A jury's consideration of documents that were not admitted into evidence "does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case." *Id.* at ___, quoting *Phillips v Diehm*, 213 Mich App 389, 402–03 (1995). This includes a determination whether the documents were actually considered by the jury in reaching a verdict. *Mays, supra* at ___, quoting *People v McCrea*, 303 Mich 213, 266 (1942). In *Mays*, during deliberations in a medical malpractice case, the jury requested the plaintiff's complete medical records. Inadvertently, the jury was provided with defense counsel's banker's box, which contained numerous items about the case that were not admitted at trial: other medical records, deposition transcripts, deposition summaries, memos to the file, correspondence with the client and the client's insurance company, and defense counsel's notes. The Court of Appeals overturned the trial court's decision granting a new trial "because the record does not reflect that the jury in fact looked at, let alone relied on, the materials not admitted into evidence"

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.58 Sentencing—Sexually Delinquent Person

C. Application

Add the following text to the end of the first paragraph on page 463:

Alternatively, the court may place the defendant on probation. *People v Buehler*, ___ Mich App ___, ___ (2005).